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Building A Future

An Overview of Resource Development

Major Projects



Canada

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Gaining Access to Major Resource Development Projects Located Off Reserve

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Introduction

Resource development has been increasing near First Nation communities for several years. Some projects bring benefits and spinoff opportunities, some do just the opposite. What is the best way for First Nations to deal with off-reserve development? Does it make sense to try to get involved? How can a First Nation protect itself from possible environmental hazards caused by nearby development? How can a First Nation benefit? What are the costs?

Many First Nations are getting more involved in off-reserve resource development in an attempt to control their impact on their reserves. To achieve this, they want to be included at the planning stages; they want to participate in the benefits; and they want compensation for damage to the environment and their traditional lifestyle.

This booklet is one of a series of DIAND publications entitled *Building a Future - An Overview of Resource Development*. The series has been produced in response to requests by First Nations for material on resource development. Designed as booklets, each publication looks at the development of a different resource from the point of view of a First Nation community. This text offers a slightly different approach from the others since its topic is not development of a single resource but how to handle any kind of major project that might affect the land, economy or culture of First Nations. It provides information on how First Nations can plan their response to major projects near reserve lands.



The Importance of a Development Policy

A development policy provides guidelines for all sorts of unforeseen circumstances. It sets out the approach for investigating natural resource development whether it is happening near your reserve or whether you are looking into development of your own. It provides for informed decisions on all aspects of development that affect your community and helps maintain a focus on your priorities for investment of both time and money.

A development policy not only provides direction in dealing with the unexpected, it is its own road map, guiding those who will be implementing it on behalf of your community.

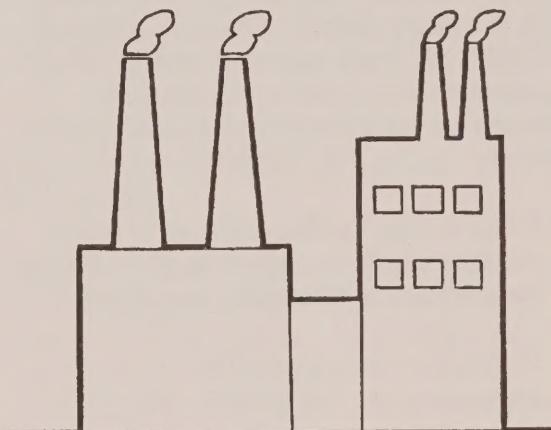
It helps to establish:

- the terms, conditions and limits of development;
- the extent to which economic development is a community priority;
- which development projects to study first; and
- how to reconcile economic interests with environmental, social, cultural and traditional ones.

A written community development policy may prevent misunderstandings later on. It should also be developed through community participation. If your band members have been consulted on its formation, they are more likely to approve of and support it.

Major Off-Reserve Projects in the Development Policy

A "major" project, for our purposes, is defined as one big enough for project developers to be willing to customize their development activities to the needs of First Nations. This means that the development would be carried out according to First Nation specifications. Typically, the capital costs of a major project exceed \$10 million. It might be a pulp and paper mill, an oil refinery, a tar sand plant, a pipeline, a highway, a hydro-electric installation, a mine, a golf course, a hotel or a cottage development.



Whatever the project, if it's on your doorstep, it will certainly have an impact on your community in some way. With a development policy already in place, you will have a head start in planning how to respond. The policy will provide the structure for:

- a pre-development information gathering system;
- benefit and cost assessments;
- decisions on what development activity you want to support, change or oppose;
- how to influence the course of the project;
- how to deal with the possible effects of the project on your community; and
- how to negotiate, design and implement an agreement with the project developer.
- Canvass local and other politicians for advance information and notification of pending projects.
- Monitor national major project data bases, such as the *Canadian Capital Projects* data base, published quarterly by Informetica Limited, P.O. Box 828, Station B, Ottawa, Ontario K1P 5P9.

Even with such an early warning system in place, off-reserve development can still catch you unaware. A development policy allows you to react fast. Even if it's too late to become involved in the initial planning stages of the project, you can still influence its later planning and construction progress.

Advance Planning

Your first step is to set up a process for identifying proposed or planned projects in your vicinity. Don't depend on the rumour mill: it usually alarms without foundation. Establish an "early warning system" which could include a number of sources to monitor for signs of proposed development activity.

- Keep in touch with personnel of major development companies in your area to hear about anything on the horizon.
- Watch the newspapers for announcements of federal and provincial energy and environmental board review hearings and resource development articles. Talk to the journalists who wrote them.
- Major project applications are reviewed by such regulatory organizations as the National Energy Board, provincial energy boards and federal and provincial environmental bodies. Check their reports.

The Process

You have received word that there is a major project in the works for land adjacent to your reserve. At this stage there are five activities to consider.

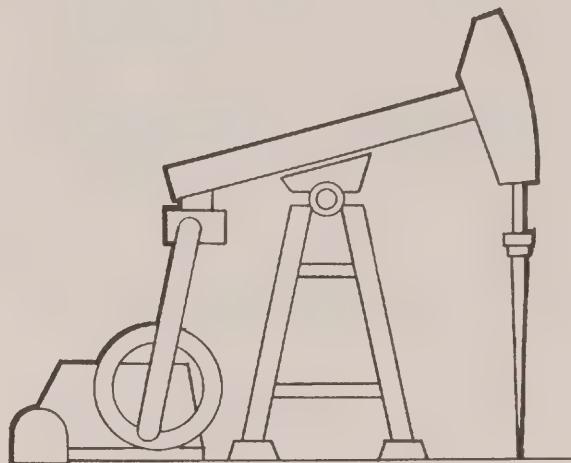
- Form a committee to respond to the project.
- Examine the possibility of forming a partnership with other communities in your area which are affected.
- Review the developer's information and identify baseline information.
- Develop community profiles and plans.
- Analyse the nature and implications of the project including a cost and benefits analysis.

Form a Local Community or Area Committee to Respond to the Project

A knowledgeable and effective committee would be composed of a community person responsible for research related to the development project and a planning group made up of people who represent the community or area interests. An existing structure, such as a band council, could co-ordinate activities.

The planning group could:

- monitor existing information on the project;
- assess information from both a technical and community point of view;
- prepare information on the committee's position;



- handle relations with the media; and
- provide feedback to community members through workshops and meetings.

Examine the Possibility of Forming Partnerships

As a single community, you might not have the resources to influence the course of a project on your own, especially if the project is initiated by a development conglomerate. Partnerships strengthen your position. If the development is going to affect other communities, work together with them, other First Nations, environmental organizations, local residents and others who may have objectives similar to your own.

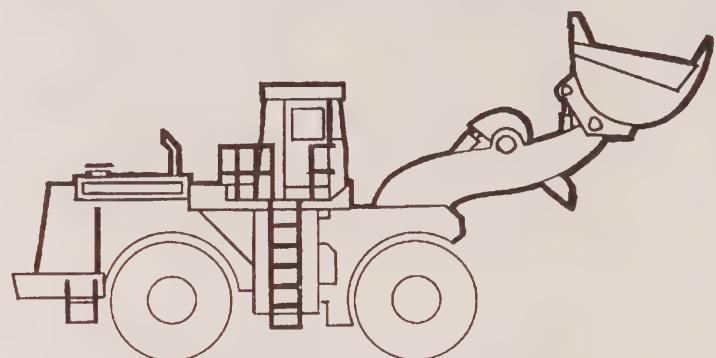
Various regional and provincial First Nations organizations may bring different goals to an alliance. However, in the context of resource development, strong partnerships among First Nations build and strengthen Native self-government. The stronger the alliances, the better the chances of modifying or influencing the project.

Review the Developer's Information and Identify Baseline Information

Verified, accurate information is a starting point. Data provided by the developer and federal or provincial regulatory bodies, plus a study of existing situations and relationships within your community and among all the affected communities should be included. Gather information on existing infrastructure, services, labour-force numbers and skills, social and economic patterns of land use and how these could be affected by the project. List the negative and positive changes.

Benefits could include:

- training;
- employment;
- business development;
- equity participation;
- stronger socio-economic, cultural and political bases; and
- direct involvement in working out ways to reduce any negative impact of the project.



Costs could include:

- disruption of hunting, fishing and trapping activities;
- damage to the environment; and
- social problems.

Develop Community Profiles and Plans

When one project affects several communities, there will be issues and goals common to them all. Although each community can prepare its own profile and outline its own situation and needs, you should also be able to develop a unified approach to common issues.

For example, by sharing information on transportation, labour-force skills and infrastructure development, you can take advantage of resource development in the whole area.

Analyse the Nature and Implications of the Project

Depending on the stage of development, information has probably already been amassed by developers, energy and environmental boards and other government bodies. Use this as part of your baseline data. Studies and documents on similar resource development projects, available from libraries and municipal and provincial record offices, are also helpful.

Circulate the information to your own community members as well as to the other affected communities. Get their reaction to the project and their input on how to proceed. Then decide whether a joint response is the best way to go.

Influencing the Course of the Project

Whatever the project, your position will be strengthened by a thorough knowledge of the company responsible for it. This achieves two things: it eliminates surprises at the negotiating stage and it helps to establish a relationship with those developers that want to work with local communities. More and more companies are recognizing the value of doing so for a number of reasons:

- a corporate commitment to First Nations development;
- significant First Nations investments and market;
- concerns about the security of their investments;

- the need to project a co-operative image because of investments or potential investments in projects near First Nation communities;
- a need to increase corporate Aboriginal hiring because of employment equity legislation; or
- economic benefits in hiring and training local labour instead of importing workers from other areas.

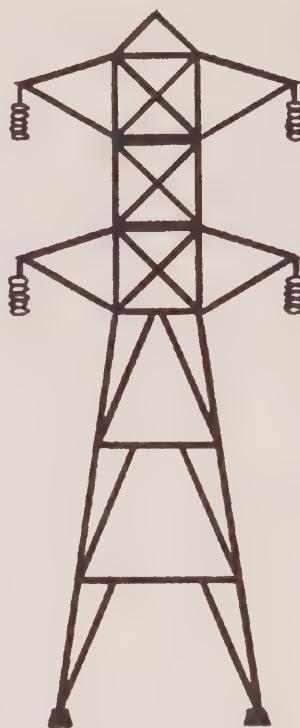
The Public Review Process

If the project involves federal land or money, federal approval or a federal regulatory decision, it will be evaluated under the Environmental Assessment Review Process (EARP). Depending on the nature and scope of the project, a formal public review process may be recommended by the appropriate federal Minister. This is an opportunity for your community to participate and ensure that your concerns are addressed.

More information on EARP can be obtained from the Canadian Environmental Assessment Agency (CEAA) formerly the Federal Environmental Assessment Review Office, 14th Floor, Fontaine Building, 200 Sacré-Coeur Blvd., Hull, Quebec, Mail: Ottawa, Ontario K1A 0H3. Tel.: (819) 997-1000. Information may also be obtained from DIAND's regional offices (See Appendix B).

The environmental assessment review process is also a way to involve your community in the decision-making process.

- Find out which regulatory agency will be reviewing the developer's application from either your provincial ministry of the environment or CEAA. At the same time ask for the guidelines available to the public on the criteria and procedures for the review process.
- Notify the developer and regulatory agency *in writing* that your community wants to be a formal participant and wants to receive copies of information submitted by other parties.
- Prepare a formal submission. Legal and technical advisors can help with the preparation.
- Prepare for a lengthy process. Develop a system within your planning group to receive information from all available sources on the progress of the project. Analyse, update and distribute this information to community members. You will need constant, up-to-date information throughout to be able to change or redraft your submission accordingly.
- Talk with other groups who have been through similar public hearings.
- Organize support from other groups, e.g. environmentalists.
- Conduct research and prepare arguments and presentations to support your objectives.



Note that in some cases, a developer's application may be approved without a formal public hearing. Rather, it may be reviewed by the approving provincial or federal department. It is this situation that may catch you unaware if your committee has not set up its monitoring system.

Negotiating an Agreement

The goal of the negotiation is to reach a specific agreement with the developer on participation in the benefits of the project and reduction of negative effects.

Effective negotiation includes the development and implementation of a negotiating strategy; the development of negotiating issues and positions; the clarification and consolidation of the negotiating process; and the development of content and format of the agreement.

The Negotiation Strategy

Build your strategy on your strengths. Find out what leverage you have with respect to the development. For example, is First Nation consent legally required for development to proceed? Could the project cause downstream pollution on the band's lands?

The political environment is important too. Are environmental regulations being enforced? What is the developer's attitude to affirmative employment action? Is the company genuinely interested in negotiating business benefits with First Nations?

Negotiating Issues and Positions

Typically, negotiations are conducted over such issues as:

- on-the-job and preparatory employment training;
- hiring policies of the developer;
- counselling and support services;

- business development opportunities;
- development of community infrastructure;
- equity participation in development;
- resource revenue sharing;
- joint venture; and
- compensation for damage to the environment, usually in the form of a cash settlement or land rehabilitation.

By looking at the development's potential benefits and possible detriments to your community, you will ensure that your negotiating position covers all bases.

The foundation for a strong negotiating position is a comprehensive community profile and a thorough analysis of the implications of the project. This analysis would include baseline data weighed against the effects. For example, your analysis of the project will tell you what kind of jobs might be available. You can then match this projection with your community profile to identify what you need to change to take advantage of those job opportunities. The focus might be on:

- social and economic employment barriers;
- present skill levels of local workers;
- counselling and support services required;
- transportation needs; and
- social and infrastructure development necessary.



Analysing the project in relation to your community profile will also allow you to assess potential business opportunities against present levels of capital, management and technical skills in the community. For instance, your community may be excluded from bidding on tenders relating to work associated with the development because, in some cases, the design of a tender excludes smaller entities, such as a First Nations band or group of local companies, from bidding.

Environmental and cultural issues will be considered to highlight the implications of altering traditional land-use patterns. From these, you can determine the amount and nature of compensation, or the measures needed to minimize environmental damage.

The Negotiating Process

There are three common forms of negotiation over resource development: direct negotiation, mediated negotiation and arbitration.

As the term suggests, direct negotiation is a face-to-face discussion between both parties. In a mediated negotiation, an appointed mediator – an individual who is called in to help settle a dispute – works with both sides, separately and together, to help develop negotiating positions that will lead to an agreement. In the arbitration process, both parties agree that if they fail to reach an agreement, an arbitrator can impose a resolution. The arbitrator, whose powers are extensive, is usually appointed by an external body only when negotiations break down.

Direct Negotiation

Organization and clarity are the goals here. Clarify who makes up the negotiating team (the spokespersons) and who are the advisors to the team. Too many voices confuse the issue and may weaken your position.

The negotiating team should have the full backing of the community. Without it, your team's bargaining ability is weakened. To ensure community backing, set up a process of consultation and ratification to establish ground rules for the team. For example, is the team allowed to bargain and make decisions in the name of your community? Will your community review specific items and positions as they are negotiated?

Ideally, the team should be your community's voice, with the authority to negotiate without having to check back all the time. Constant checking and verifying throughout the process waste time, undermine the team's credibility and increase the risk of leaks concerning the team's position to the other party.

At the outset, make sure that each party agrees with the negotiation process and how it is to be paid for, accepts the responsibility to negotiate settlements and approves the ratification procedure.

Finally, have your negotiating position established on all major and administrative issues to be covered by the agreement.

Mediation

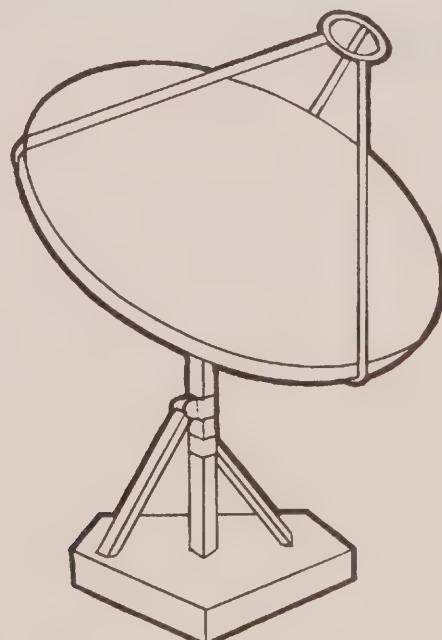
In a mediation process, the groundwork is the same but the process is a little different. Choose a mediator who is respected by all parties. Allow the time necessary for thoughtful selection.

In consultation with the other parties and the mediator, decide and document the issues to be dealt with by the mediator and how the costs of the mediation process will be covered.

Prepare submissions and funding requests to any organization whose co-operation is needed to fulfil any part of the agreement not carried out by the developer.

Arbitration

Again, the groundwork is the same. However, for a successful settlement, all parties must accept and have faith in the abilities and unbiased viewpoint of the arbitrator whose ruling on the discussions is final and binding.



Develop the Content and Format of the Agreement

The agreement must include the issues raised by both parties, reflect their positions and ensure that promises can be fulfilled. Retaining legal advice when drawing up the agreement is important.

Review the text of the agreement with your advisors before signing. This ensures that:

- wording is clear and accurately reflects intentions;
- all the essential issues have been included;
- time frames, outlines of responsibilities, structures for implementation, allocation of costs and penalties for default are included;
- measurable objectives are specified so progress can be evaluated; and
- a monitor is identified to supervise the agreement.

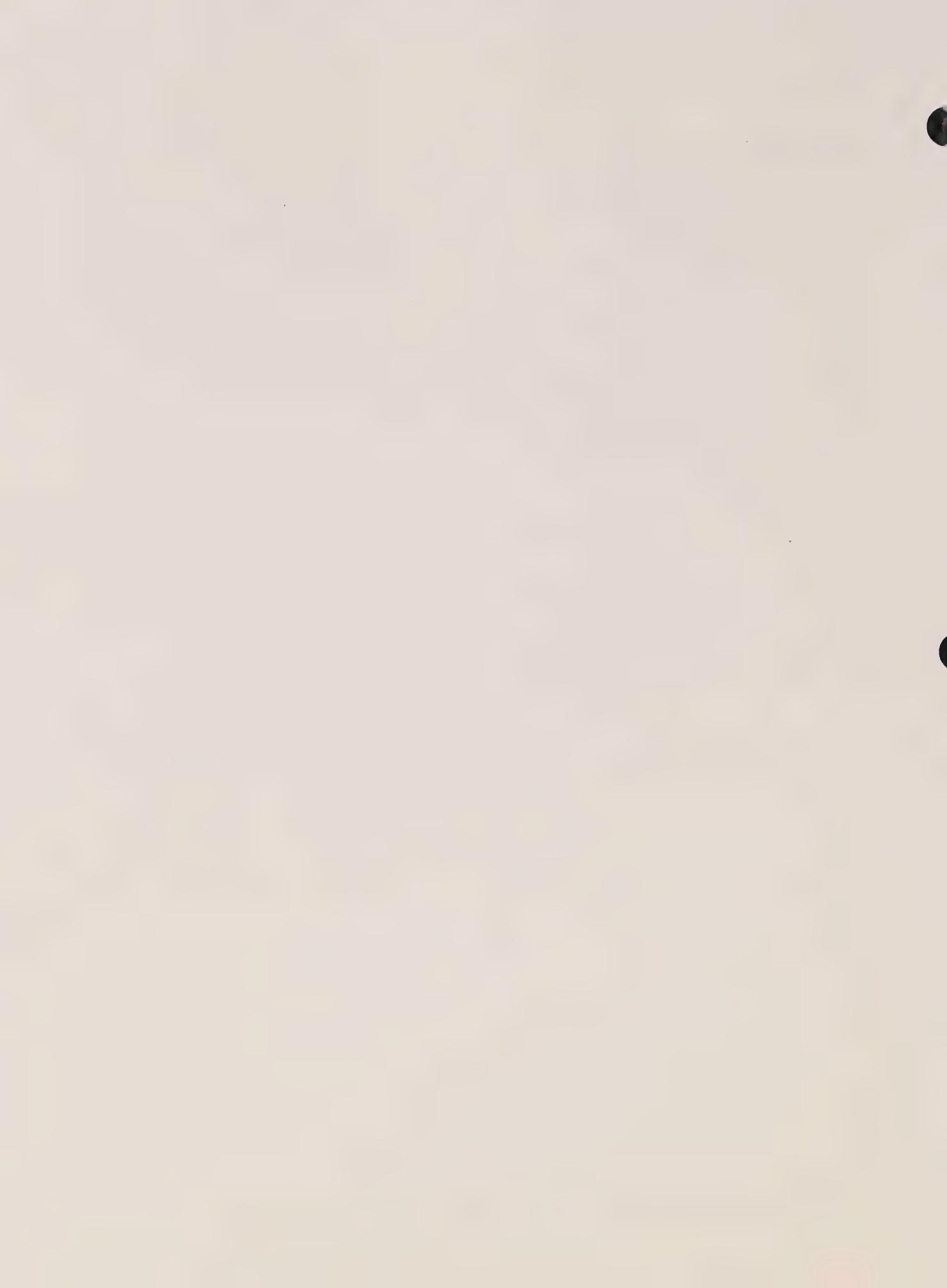
Depending on the scope of the agreement and the negotiating team's arrangements with your community, additional activities may include:

- ratification by your community;
- review of the agreement by your community's legal counsel;
- decisions about who should implement each of the specifics of the agreement;
- establishment of administrative structures to activate and maintain the agreement;
- establishment of penalties for non-compliance and deciding who will enforce them;
- review of the agreement by all parties at appropriate intervals;
- evaluation of the effectiveness of the agreement in achieving First Nation participation; and
- allocation and specification of costs for all the above activities.

Conclusion

Major projects vary in size and scope from region to region. They may have similar development patterns, but your involvement in the negotiating process will be individualized. The process will be smoother if you incorporate your response to major off-reserve development into your community development policy. This form of planning provides the mechanisms for advance warning of possible development in your area; the collection of strong baseline data; and the marshalling of community support for your negotiating team and its strategies.

It allows you to form strong alliances with other affected communities before development begins. It strengthens your bargaining position and adds credibility to your response. Finally, such planning allows you to enlist important expert and legal advice in drawing up the agreement under which your First Nation participates.



Appendix A

Dona Lake Mine – Dona Lake Project

The Dona Lake Mine – Dona Lake Project illustrates the individuality of a negotiated project.

Background

The Windigo Tribal Council in northwestern Ontario comprises seven bands: Bearskin Lake, Cat Lake, Osnaburgh, Sachigo Lake, Scugog Nation, Caribou Lake and New Slate Falls. The area also contains the incorporated communities of Pickle Lake, Sioux Lookout and several smaller settlements of fewer than 50 people. The 1986 population of the Windigo Tribal Council area, including the non-Native communities, was about 6,600. Status Indians made up about half of the total population of the area. Most (80 percent) status Indians lived on reserves. The remainder lived on Crown lands and in other communities.

1. Identify Planned Off-Reserve Projects

For several years, mining exploration activity took place on off-reserve lands in the Windigo Tribal Council area. At least two mines, Dona Lake and Golden Patricia, were being constructed by Dome Mines Ltd. and St. Joe Canada respectively. Six more mines were planned over the next five years.

This represented an investment of \$53 million with another \$70 million planned. From 2,000 to 3,000 jobs would be created by the development.

2. Take the First Step in Dealing with the Project

The tribal council realized the impact this development would have on the communities of its member bands. The council discussed the development with its communities. Together, the council and community representatives looked at options for participating in the development and ways to bring the mining companies to the negotiating table to address community concerns.

3. Legitimize a Claim to Influence the Course of the Project

The Windigo Tribal Council wrote to the Ontario Minister of the Environment requesting that the Dona Lake Mine project be designated under environmental legislation.

This led to a series of meetings with the province of Ontario, the tribal council and the Osnaburgh Band. The parties agreed that negotiations between Dome Mines and the tribal council, Ontario and the Government of Canada would be preferred to public environmental hearings to address the tribal council's and the band's concerns.

The parties preferred the negotiation process because:

- public hearings could impose costly delays;
- the mining companies could incur unknown and potentially expensive obligations during the hearing process; and

- public hearings could bring out environmental extremes which could prevent future development activities.

4. Negotiate, Design and Implement an Agreement

The Windigo Tribal Council hired a researcher to help prepare for and conduct negotiations. The researcher spent a great deal of time in the communities collecting information, documenting concerns, providing information on the developer and the proposed mine, and introducing a community awareness program on mining to the communities. Arrangements were made for a number of community residents to visit various mining operations to get first-hand information and observe some of the effects of the operation in detail. The researcher also acted as an advisor to the tribal council's negotiating team.

DIAND represented the Government of Canada at the negotiations. The ministries of Native Affairs and Northern Development and Mines represented the province of Ontario. The negotiations on behalf of the tribal council were conducted by appointees of the council and their legal advisor. All parties agreed to the hiring of a facilitator to manage the process and draw up the agreement based on the negotiations.

Conduct the Negotiations

The process used was that of direct negotiation, that is, all parties sat down and worked out an agreement. At the initial meeting, both the mining company and the tribal council presented a statement of principles, based on what each thought would be negotiated and, to some extent, on what each expected from the negotiations.

Negotiations with Dome Mines over the Dona Lake Project began in 1986. An agreement, signed by DIAND, Ontario, the Windigo Tribal Council, the Osnaburgh Band and Dome Mines, was finalized in 1987.

The Agreement

The agreement established a process to negotiate a range of specific sub-agreements on employment and training, administrative costs, managing the general agreement and human resources.

The general agreement made commitments in the following areas.

- Employment training and human resource development:
 - to provide maximum employment to member bands of the Windigo Tribal Council;
 - to provide training for band members looking for work or apprenticeships; and
 - to provide scholarships for project-related technical education.
- Economic development:
 - to help establish a transportation service and a sawmill, if feasible;
 - to provide the council with advance notice of requirements so council members could bid on supplying the goods and services; and
 - to review timber management and to make provisions to alter the development project.
- Traditional pursuits:
 - to have special work schedules which allow for the pursuit of traditional economic activities;

- to study ways of protecting and enhancing traditional harvesting and provide compensation if the project has a negative impact on harvests; and
- to have Ontario provide appropriate notice of proposed resource development projects and to facilitate comprehensive resource planning in the area.

▪ Environmental protection:

- to comply with all federal and provincial environmental requirements during all phases of the project.

▪ Social, cultural and community support:

- to contribute to the building of a community hall;
- to prohibit non-band employees from entering reserve lands without band permission;
- to contribute to a study on capital planning; and
- to co-ordinate existing programs to facilitate the delivery of appropriate services.

▪ Agreement administration, management and implementation:

- to consult on project-related issues;
- to establish appropriate management and co-ordinating bodies; and
- to provide assistance in cost-sharing the implementation of the agreements.

A similar process was used to negotiate the Golden Patricia (St. Joe Canada) agreement. As a result of the precedent set with the first agreement, the Golden Patricia agreement was reached in less time.



Appendix B

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